ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NO. 90-6588

MRS. JAKE AYERS, SR., VERNON B. AYERS, WILLIAM B. AYERS, LEOLA BLACKMON, PAMELA GORDON, BONNIE JARRETT, NETTIE TYSON, JAMES MOORE and BEATRICE HOUSTON, et. al.,

PETITIONERS,

and

UNITED STATES OF AMERICA

PLAINTIFF - INTERVENOR,

VERSUS

WILLIAM ALLAIN, GOVERNOR, STATE OF MISSISSIPPI, et al.

RESPONDENTS.

RECEIVED
DEC 17 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
DEC 20 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

PETITIONERS, Mrs. Jake Ayers, Sr., Vernon B. Ayers, William B. Ayers, Leola Blackmon, Pamela Gordon, Bonnie Jarrett, Nettie Tyson, James Moore and Beatrice Houston, by their Attorney, Alvin O. Chambliss, Jr., a member of the Bar of this Court, pursuant to

82 pp

Rule 39.2 of this Court and 28 U.S.C. Section 1915 move the Court for an Order permitting petitioners to proceed In Forma Pauperis, without payment of fees and costs. In support of this Motion the following is stated:

(1) Petitioners all are eligible clients of the North Mississippi Rural Legal Services, Inc., and are seeking review of a judgment of the Fifth Circuit Court of Appeals in the Mississippi Higher Education case hereinafter Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987) 893 F.2d 732 (5th Cir.1990) reversed and dismissed 914 F.2d 676 (5th Cir.1990) (en banc).

(2) This case is one of considerable breadth. The District Court's published Opinion is forty pages long while the Fifth Circuit Opinions consists of thirty and twenty-four pages respectively. The transcript consists of 4,413 pages, the product of a "five-week bench trial" where "the Court heard testimony from seventy-one witnesses and received 56,700 pages of exhibits..."Ayers, supra, 674 F. Supp. at 1526. The District Court held that as of 1962 "Defendants' racially segregative policies encompassed..." seven areas. The District Court's Opinion consists of extensive discussions of the subsequent status of these seven areas and their "sub-parts." Nevertheless the Court dismissed Ayers, supra as well as the en banc Court of Appeals for the Fifth Circuit and Petitioners now urge this Court to allow them to proceed In Forma Pauperis.

Petitioners are without sufficient resources to pay the cost associated with this review. The agencies which are representing Petitioners likewise are unable to pay all costs and fees herein.

Petitioners submit the attached affidavits in support of this Motion swearing that they do not possess sufficient means to pay for the costs of this litigation.

WHEREFORE, the Petitioners pray that an Order Granting Leave to Proceed In Forma Pauperis be likewise granted and all other relief the Court may deem proper.

Respectfully submitted,

ALVIN O. CHAMBLISS, JR.
LEAD COUNSEL
NORTH MS RURAL LEGAL SERVICES, INC.
1006 Jackson Avenue
P. O. Box 928
Oxford, MS 38655
(601) 234-2918
A Member of the Mississippi State Bar and the U. S. Supreme Court Bar

DATED: DECEMBER 19, 1990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO._____

MRS. JAKE AYERS, SR., JAKE AYERS, JR., et. al., PETITIONER,

VS.

BILL ALLAIN, et. al., RESPONDENT,

AFFIDAVIT

I, MRS. JAKE AYERS, SR., being first duly sworn, according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees: 1. I am the petitioner in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay

the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

      $1,114.40 Per Month from Washington County of Opportunities, Inc., I am employed only 8 months a year.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

      Not Applicable

2. Have you received within the past twelve months any income from a business, profession or other form of selfemployment, or in the form of rent payments, interest, dividends, or other source? Yes

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

      $407.00 per month Widow's pension from deceased husband's Social Security.

3. Do you own any cash or checking or savings account? Yes

   a. If the answer is yes, state the total value of the items owned.

      Checking account with Bank of Hollandale, ending balance $100.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

   Corner of County Road 39 and County Road 8 in Glen Allan, Mississippi. Approximate value of $25,000.00.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Lester Barry Ayers, my son

6. I owe approximately $5,450.00 to the following creditors:

   Norwest Finance, Discover Card, Sears, Visa, Gayfers, Penneys and McRaes.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Mrs Jake Ayers Sr

MRS JAKE AYERS, SR.

SUBSCRIBED AND SWORN TO before me this 10th day of December, 1990.

Lucille Conyers

NOTARY PUBLIC

MY COMMISSION EXPIRES My Commission Expires October 10, 1994

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS.

I, Vernon B. Ayers, being first duly sworn, depose and say that I am a PETITIONER, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? yes

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

Name of company and address	Amount of Salary
FENCE INC. 2nd Ave. Greenville, Ms.	375.00

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes

a. If the answer is yes, state the total value of the items owned. $7.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. Of the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Kristal Chiefy (SON) A. Shake White (Daughter)
Reginald Chiefy (SON) VERNON B Ayers II (SON)

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Vernon B. Ayers

SUBSCRIBED AND SWORN TO before me this 14th day of December, 1990.

Loretta Ingram

NOTARY

MY COMMISSION EXPIRES _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS.

I, Millie B. Ayers, being first duly sworn, depose and say that I am a Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? YES

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

Name of company and address	Amount of Salary
MOCHER MFG Co. Pecan St.	$1200.00 per month

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes $ 300.00

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

a. Of the answer is yes, describe the property and state its approximate value.

Truck 1975 Pickup $700.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Dyola Ayers wife — William Correll son
James Correll son — Jessica Correll Daughter
Amber Correll Daughter — Phillip Ayers Son

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

William B. Ayers

SUBSCRIBED AND SWORN TO before me this 19th day of December, 1990.

Juanita Ingram

NOTARY

MY COMMISSION EXPIRES _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS,

I, LEOLA BLACKMON, being first duly sworn, depose and say that I am the PETITIONER, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? no

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. 4-30-1988 $650.00

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? NONE
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? $500.00
   a. Of the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Leola Blackmon

STATE OF MISSISSIPPI
COUNTY OF CARROLL
SUBSCRIBED AND SWORN TO before me this 14th day of December, 1990.

Della Emmons Parks
NOTARY

MY COMMISSION EXPIRES July 28, 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS,

I, Pamela Barker Petitioner, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? NO

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. August 1990 $375 per mo

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. Of the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I support myself

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Pamela Gordon

SUBSCRIBED AND SWORN TO before me this 12th day of December, 1990.

Jay D. Shaw

NOTARY

MY COMMISSION EXPIRES My Commission Expires Aug. [illegible], 199[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS,

I, Bonnie Jarrett, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. August 1983 $850.00 per Month

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Re-Retired disability from Orland City Schools & Social Security Disability.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes

a. Of the answer is yes, describe the property and state its approximate value. Mobile home $25,000.00

Car - $12,000.00

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Geoffrey Reeds - Son
Jason Reeds - Son

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Donna Jarrett

SUBSCRIBED AND SWORN TO before me, this 12th day of December, 1990.

Kay D. Shaw
NOTARY

MY COMMISSION EXPIRES My Commission Expires Aug. 15, 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS,

I, Nettie Tyson, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? yes

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

Whirlpool INC. Oxford, MS. 200.00 per week approximately 680.00 per month take home pay.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? NO
   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO
   a. Of the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.
   Rick Tyson - Mother
   DeVin Tyson mother

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Nettie Tyson

SUBSCRIBED AND SWORN TO before me this 12th day of December 1990.

Jay D. Shaw
NOTARY

MY COMMISSION EXPIRES My Commission Expires Aug. 16, 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS,

I, James Moon, being first duly sworn, depose and say that I am the petitioners, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? Yes

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

6 13.53 per month City of Greenwood Ms.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

rental income $330.00 per month

3. Do you own any cash or checking or savings account? Yes

a. If the answer is yes, state the total value of the items owned. $5000.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? yes

a. Of the answer is yes, describe the property and state its approximate value. Car 1972 olds 2500.00

Rental Family #22000.00

5. List the persons who are dependent upon you for support and state your relationship to those persons. Grandson

James Rashaw Moore I own a house with Kylian 100% Disable, I can not afford to pay for this appeal

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

James Moore

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

SUBSCRIBED AND SWORN TO before me this 11th day of December, 1990.

Rosemary M. Crayton
NOTARY

MY COMMISSION EXPIRES 1/19/91

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

NO. _____

_____

MRS. JAKE AYERS, et. al. PETITIONERS,

vs.

BILL ALLAIN, et. al. RESPONDENTS,

I, Beatrice Hewitt, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I.

Whether the Court of Appeal erred in holding that Mississippi State Officials had discharged their obligation to disestablish the vestiges of the dual system of Higher Education when the mandates of Brown v. Board of Education 347 U.S. 483 (1954); if applicable have not been met?

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Emerson Electric - 1-11-80 - $4,357.00 M.E.

2. Have you received within the past twelve months any income from a business, profession or other from of self-employment, or in the form of rent payments, interest, dividends, or other source? none

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? no

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? no

a. Of the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Mishell Loella Nathan Keeha Hallett, mother of Kendrea Pettis assistance

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Bettie Hallston

SUBSCRIBED AND SWORN TO before me this 12th day of December, 1990.

Katherine K. Williams
NOTARY

MY COMMISSION EXPIRES My Commission Expires April 13, 1994

ORIGINAL

No. 90- 90-6588

In The
Supreme Court of the United States
October Term, 1990

Jake Ayers, Jr., et al.,

Petitioners

United States of America

Plaintiff-Intervenor

v.

William Allain, Governor,
State of Mississippi, et al.

Respondents

Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

Robert Pressman
Center for Law and Education
955 Massachusetts Avenue
Cambridge, MA 02139
(617)876-6611

Alvin O. Chambliss, Jr.*
North Mississippi Rural
Legal Services
P.O. Box 928
Oxford, MS 38655
(601)234-2918

Lawrence Young
North Mississippi Rural
Legal Services
P.O. Box 767
Oxford, MS 38655
(601)234-8731

* Counsel of Record

Questions Presented for Review

1. Whether the court of appeals erred by holding that Mississippi officials, who had created a "separate and unequal" system of higher education (A. 6, 29), could avoid dismantling that system, and could wholly satisfy their "constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures" (A. 80, footnote omitted)?

2. Whether the court of appeals erred by failing to apply a Title VI regulation addressing defendants' remedial obligation, i.e., 34 C.F.R. §100.3(b)(6)(i) (A. 89), in a manner consistent with administrative standards (A. 90-96) explaining the application of that regulation to state-created, separate and unequal systems of higher education?

3. Whether the court of appeals -- which agreed with the district court that Mississippi officials' adoption in 1961 of a test requirement for admission to the state's universities was intentionally discriminatory (A. 33, 83) -- misapplied the principles concerning intentional discrimination set forth in Hunter v. Underwood, 471 U.S. 222, 231-32 (1985)?

4. Whether the court of appeals erred by failing to hold Mississippi officials' use of the American College Test in the admission process to be inconsistent with a Title VI regulation [i.e., 34 C.F.R. §100.3(b)(2) (A. 89)]?

5. Whether plaintiffs were unfairly prevented from demonstrating at a remedial proceeding alternatives which could

more effectively dismantle the acknowledged separate and unequal system?

Parties to the Proceeding

1. This is a class action. The named plaintiffs, petitioners, are as follows:

Jake Ayers, Sr.	Albert Joe Williams
Jake Ayers, Jr.	George Bell
Hattie James	Johnny Sims
Margaret James	Thelma H. Walker
Leola Blackmon	Randolph Walker
Lillie Blackmon	Bennie G. Thompson
Shirley A. Porter	Virginia Hill
Kenneth Spearman	B. Leon Johnson
James T. Holloway	Pamela Gipson
Dave Collins	Jamice K. Miggins
Lewis E. Armstrong	Floyd Alexander
Darryl C. Thomas	

2. The defendants-respondents are state agencies and officers. They are as follows:

(a) William Allain, in his official capacity as Governor of the State of Mississippi and his successor, Ray Mabus.

(b) The Board of Trustees of State Institutions of Higher Learning of the State of Mississippi.

(c) The individual members of the Board of Trustees of State Institutions of Higher Learning, in their personal and official capacities: Cass Pennington, Joe A. Haynes, Dianne Miller, Nancy McGahey Baker, Frank Crosthwait, Jr., Will A. Hickman, J. Marlin Ivey, Bryce Griffis, William M. Jones, James W. Luvene, Dianne Walton, and Sidney L. Rushing.

(d) Delta State University, and its president, F. Kent Wyatt, in his official capacity.

(e) Mississippi State University, and its president, Donald W. Zacharias, in his official capacity.

(f) Mississippi University for Women, and its president, Clyda S. Rent, in her official capacity.

(g) The University of Mississippi, and its chancellor, R. Gerald Turner, in his official capacity.

(h) The University of Southern Mississippi, and its president, Aubrey K. Lucas, in his official capacity.

(i) W. Ray Cleere, in his official capacity as Commissioner of Higher Education of the State of Mississippi.

Table of Contents

	Page
Questions Presented for Review	i
Parties to the Proceeding	iii
Table of Contents	v
Table of Authorities	viii
Reports of Opinions	xi
The Grounds for Invoking the Jurisdiction of the Court	xii
The Legal Provisions Involved in this Case	xii
The Basis for Jurisdiction in the District Court	xii
I. Statement of the Case	1
A. Procedural History	1
B. Mississippi Officials Created a Separate and Unequal System of Higher Education	2
C. The Separate and Unequal System is Substantially Intact	4
1. Black Citizens Continue to Have Limited Access to the System of Higher Education	4
2. Enrollment Patterns	5
3. Composition of Administrative Staffs	6
4. Faculty Composition	7
5. There are Disparities in Programs and Funding Traceable to the Discriminatory System	7
a. Programs in General	8
b. Land Grant Programs	9
c. Funding	9

D. The Institutional Mission Designations of 1981 Had the Effect of Maintaining the More Limited Program Scope at the Historically Black Institutions (Adversely Affecting their Students and Ability to Attract Others) 11

E. The Defendants Adopted Admission Standards Which Are Racially Discriminatory and Have Impeded the Liquidation of the Discriminatory System 12

1. The Defendants Adopted and Maintained an Intentionally Discriminatory Testing Requirement for Admission to the Universities 12

2. The Defendants' Test Score Requirements for Admission Have Impeded the Liquidation of the Discriminatory System 14

a. The Minimum Score Requirements on the American College Test (the ACT) Have Uniformly Been Higher at the Historically White Schools 14

b. Exceptions to the Minimum Score Requirements Have Been More Generous at the Historically Black Schools 15

c. The Pattern, by Race, of ACT Scores: Black Student Score Substantially Lower than White Students 15

d. Factors Promoting Application by Black Persons to Historically Black Universities 16

3. More Inclusionary, Alternative Admission Criteria Are Available 17

II. The Reasons Relied Upon for Allowance of the Writ 18

A. Introduction: The Separate and Unequal System is Substantially Intact 18

B. Issue One: The Standards Governing the Defendants' Obligation Under the Constitution 22

1. The Court of Appeals' Holding Concerning the Appropriate Remedial Standard Is In Conflict with Holdings of the Court of Appeals for the Sixth Circuit 22

2. The Court of Appeals' Decision on the Proper Remedial Standard Involves an Important Question of Federal Law which Has Not Been But Should be Settled by this Court 23

3. Alternatively, the Court of Appeals' Decision Conflicts with Decisions of this Court Establishing the Standards Applicable in Instances of Systemic Racial Discrimination by State Actors 27

a. In Instances of Systemic Racial Discrimination, State Officials Are Required to Liquidate Racial Discrimination and Its Effects Insofar as Possible 27

b. Bazemore v. Friday 31

c. The Opinion of the Panel Majority Employed The Correct Standards 34

d. The Bazemore case is Factually Distinguishable from this Case 35

e. The Decision of the En Banc Majority Conflicts with this Court's Applicable Decisions 38

C. Issue Two: The Defendants' Remedial Obligation Under Title VI [S.Ct. Rule 10.1.(c)] 41

D. Issue Three: The Misapplication of the Principles of Hunter v. Underwood [S.Ct. Rule 10.1.(c)] 44

E. Issue Four: The Use of the ACT in Violation of the Title VI Regulation [S.Ct. Rule 10.1.(c)] 46

F. Issue Five: The Absence of a Remedy Hearing [S.Ct. Rule 10.1.(c)] 48

Table of Authorities

Table of Cases

	Page
Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd, per curiam, 393 U.S. 400 (1969)	24,25,26
Anderson v. Celebrezze, 460 U.S. 780 (1983)	25
Anderson v. Martin, 375 U.S. 399 (1964)	19
Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987)	passim
Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990)	passim
Ayers v. Allain, 898 F.2d 1014 (5th Cir. 1990)	2
Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc)	passim
Bazemore v. Friday, 478 U.S. 385 (1986)	21,24,25,31-41,43
Board of Education v. Harris, 444 U.S. 130 (1979)	46
Brown v. Board of Education, 347 U.S. 483 (1954)	3,29,34,35
Brown v. Board of Education, 349 U.S. 294 (1955)	31,33,34, 35,39,49
Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980)	46
Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970)	28,29,30
Columbus Board of Education v. Pennick, 443 U.S. 449 (1979)	28,30
Dayton Board of Education v. Brinkman, 433 U.S. 526 (1979)	21,30,31
Dothard v. Rawlinson, 433 U.S. 321 (1977)	45
Geier v. Alexander, 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886 (1979)	18,23,37
Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986)	18,22,24
Georgia Conferences of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985)	46
Goss v. Lopez, 419 U.S. 565 (1975)	45

Green v. County School Board 391 U.S. 430 (1968) 28,30,32,33, 34,35,39,49

Griggs v. Duke Power Company, 401 U.S. 424 (1971) 46

Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983) 42,46,48

Guinn v. United States, 238 U.S. 347 (1915) 28

Hawkins v. Board of Control, 350 U.S. 413 (1956) 20,46

Honig v. Doe, 108 S.Ct. 592 (1988) 42

Hunter v. Underwood, 471 U.S. 222 (1985) 14,36,44-45

Jackson v. Wygant, 476 U.S. 267 (1986) 20

Keyes v. School District No. 1, 413 U.S. 189 (1973) 28

Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) 46

Lau v. Nichols, 414 U.S. 563 (1974) 42

Louisiana v. United States, 380 U.S. 145 (1965) 28-29,31,33

Loving v. Virginia, 388 U.S. 1 (1967) 26,27

Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962), cert. denied, 371 U.S. 828 (1962) 1

Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962), cert. denied, 371 U.S. 828 (1962) 1,3

Milliken v. Bradley, 433 U.S. 267 (1977) 28,29,31,39,41

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 45

Norris v. State Council of Higher Education, 327 F. Supp. 1368 (E.D. Va. 1971), aff'd without written opinion, 404 U.S. 907 (1971) 26

Plaquemines Parish School Board v. United States, 415 F.2d 817 (5th Cir. 1969) 21

Quarles v. Oxford Municipal Separate School District, 868 F.2d 750 (5th Cir. 1989) 46

Rogers v. Paul, 382 U.S. 198 (1965) 38,40

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 21,28,30,36,37

Sweatt v. Painter, 339 U.S. 629 (1950) 8,20-21

United States v. Alabama, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S.Ct. 2857 (1988) 8,23,24

United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), adopted in pertinent part, 380 F.2d 385 (1967) (en banc), cert. denied sub nom. Caddo Parish School Baord v. United States, 389 U.S. 840 (1967) 19

United States v. Lawrence County School District, 799 F.2d 1031 (5th Cir. 1986) 30

United States v. Louisiana, 692 F. Supp. 642 (E.D. La. 1988) 23

Village of Arlington Heights v. Metropolitan Housing Development Authority, 429 U.S. 252 (1977) 47

Other Authorities

34 C.F.R §100.3(b)(2) 36,46

34 C.F.R. §100.3(b)(6)(i) 41-42

"Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," 43 Fed. Register 6658 (February 15, 1978) 42-43

The American Heritage Dictionary of the English Language (William Morris, Ed., Houghton Mifflin Co.) (1978) 34

Reports of Opinions

1. Ayers v. Allain, 674 F. Supp. 1523 (N.D. Miss. 1987) (Ayers I)

2. Ayers v. Allain, 893 F.2d 732 (5th Cir 1990) (Ayers II)

3. Ayers v. Allain, 898 F.2d 1014 (5th Cir. 1990)

4. Ayers v. Allain, 914 F.2d 676 (5th Cir. 1990) (en banc) (Ayers III)

The Grounds for Invoking the Jurisdiction of the Court

The judgment sought to be reviewed was entered on September 28, 1990.

Jurisdiction is conferred by 28 U.S.C. §1254(1).

The Legal Provisions Involved in this Case

The legal provisions involved in this case, and set forth in the appendix, are (a) the Fourteenth Amendment to the Constitution of the United States, (b) 42 U.S.C. §1983, (c) 34 C.F.R. §100.3(b)(2) (A. 89), (d) 34 C.F.R. §100.3(b)(6)(i) (A. 89), and (e) the "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," 43 Fed. Reg. 6658 (Feb. 15, 1978) (A. 90-96).

The Basis for Jurisdiction in the District Court

Jurisdiction in the district court was predicated upon 28 U.S.C. §§1331, 1343(3),(4).

Statement of the Case

A. Procedural History

This action was initiated in 1975 by 23 black Mississippians, alleging that state officials had denied them equal educational and employment opportunities in the operation of the state system of higher education. Plaintiffs stated claims based on the Fourteenth Amendment, 42 U.S.C. §1983, and Title VI of the Civil Rights Act of 1964. The defendants include the Board of Trustees of State Institutions of Higher Learning and its members. Each university is "under the management and control of the Board..., whose authority is plenary." See Ayers v. Allain, 674 F. Supp. 1523, 1524-25 (N.D. Miss. 1987) (Ayers I) (A.2-3).[1]

Earlier, in 1962, the Court of Appeals for the Fifth Circuit had found that "Mississippi maintain[ed] a policy of segregation in its schools and colleges", and required the admission of James Meredith to the University of Mississippi. E.g., Meredith v. Fair, 298 F.2d 696, 701 (1962); 305 F.2d 343, 345 (1962); cert. denied, 371 U.S. 828 (1962). However, the Mississippi system has never been subject to a comprehensive remedial order.[2]

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[1] The United States, stating Title VI and Fourteenth Amendment claims, intervened pursuant to 42 U.S.C. §2000h-2; and the district court certified a plaintiff class. Ayers I, A. 2, 4.

[2] Furthermore, the subject of remedy has never been the focus of a hearing. In 1986, the defendants moved "for an order granting a single trial on all issues, in lieu of a bifurcated proceeding...", contending "that separate trials of 'liability' and, if necessary, 'remedy' will not be conducive to expedition and economy and, moreover, will likely lead to

In 1987, after the trial on liability issues, the district court dismissed the case. Ayers I, A. 42. The court reasoned (id.) that defendants had satisfied their constitutional obligation regarding the state-created "separate and unequal" system. Id., A. 6, 29. The Court of Appeals for the Fifth Circuit reversed and remanded for the development of a remedial plan. Ayers v. Allain, 893 F.2d 732, 756 (5th Cir. 1990) (2 to 1) (Ayers II) (A. 67). Thereafter, rehearing en banc was granted, Ayers v. Allain, 898 F.2d 1014 (1990); and the judgment of dismissal was affirmed. Ayers v. Allain, 914 F.2d 676 (1990) (9 to 5) (Ayers III) ["Finding that the record makes clear that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish, we affirm." (A. 71)]. Four dissenters adopted Ayers II as their dissent (A. 85); Judge Higginbotham concurred and dissented, in part, with two other judges joining the dissenting portion of his opinion. A. 86. He argued that the en banc majority had approved the district court's use of an erroneous legal standard. Id.

B. Mississippi Officials Created a Separate and Unequal System of Higher Education

The Mississippi legislature created a dual system of higher education. It included three historically black institutions

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prejudice." A. 99-100, footnote omitted. The court denied the motion as "not well taken." A. 101.

(HBIs) and five historically white institutions (HWIs).[3] As of the decision in Brown v. Board of Education, 347 U.S. 483 (1954), "[this] system was both separate and unequal." Ayers I, A. 6.[4]

In 1961, the Board adopted an intentionally discriminatory test requirement for admission to the universities. Ayers I, A. 33; Ayers III, A. 83. The district court summarized the breadth of the dual, racially discriminatory system as of 1962, as follows (Ayers I, A. 29):

> The defendants do not dispute that Mississippi law forbade interracial education at the university level up to the time of the decision in Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962). Defendants' racially segregative policies at that time encompassed the areas of: (1) student enrollment, (2) maintenance of branch centers by the historically white universities in close proximity to the historically black universities, (3) employment of faculty and staff, (4) provision and condition of facilities, (5) allocation of financial resources, (6) academic program offerings, and (7) racial composition of the governing board and its staff....

The court also described initial student desegregation (1962,

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[3] The HBIs and the years in which they opened are Alcorn State University (1871), Jackson State University (1940), and Mississippi Valley State University (1950). The HWIs are the University of Mississippi (1848), Mississippi State University (1880), Mississippi University for Women (1885), University of Southern Mississippi (1912), and Delta State University (1925). Ayers I, A. 4-6.

The universities are hereafter cited by initials, i.e., HBIs: ASU, JSU, MVSU; HWIs: UM, MSU, MUW, USM, and DSU.

[4] This conclusion relied, in part, upon a report issued by the defendant Board in 1954. Id.; see also A. 102-04. In summary, the defendant Board cited, as indicia of the "far less[er]" higher educational opportunities afforded black persons: (a) the provision of programs of broader scope, including at the graduate and professional level, at HWIs for white persons, with black persons "compelled" to leave the state for advanced study; (b) the lesser overall participation of black citizens in the system; (c) the payment of lower salaries to black teachers; (d) the conferring of degrees upon white citizens at a rate exceeding that for black persons by almost six times; (e) lesser participation in the "professions" by black persons.

1965-1970), and initial faculty desegregation (1966-67 to 1974-75). Ayers I, A. 7.

C. The Separate and Unequal System Is Substantially Intact

The record establishes that the separate and unequal system has not been dismantled and is substantially intact.

1. Black Citizens Continue to Have Limited Access to the System of Higher Education

As noted (p. 3, n.4, supra), the defendant Board's 1954 report identified lesser black enrollment and lower black degree-granting rates as concomitants of the discriminatory system. The lower courts ignored evidence showing that these problems persist.

The make-up of the population in 1980 was (A. 113-17):

	Mississippi 1980 Census	
	W	B
Total	64.6%	35.4%
Under age 16	55.6%	44.4%
Ages 16-21	58.7%	41.3%
Ages 22-24	63.3%	36.7%

The composition of Mississippi's public school population, by percentage, was (A. 148-151):

	1985-86			1986-87		
	W	B	Other	W	B	Other
Grade 12	54.4	45.1	.5	54.1	45.4	.5
All grades	48.6	50.9	.6	49.2	50.0	.8

Black participation in the system was not at parity with these population figures with regard to either enrollment, or degrees received.

	Proportion of those Enrolled who Were Black, 1985-86	Proportion of All Degrees Received by Black Persons
undergraduate	30.5	23.9 (84-85)
graduate	20.7	20.6 (84-85)
professional		
vet. medicine	1.8	----
medical/dental	9.0	4.5 (82-86)
law	5.0	4.4 (85-86)
	[A. 137]	[A.179-204; no MUW data]

2. Enrollment Patterns

In 1985-86, 99.32% of the system's white undergraduate students attended an HWI. Ayers II, A. 46. In that year, 96.6% of white graduate students attended an HWI. A. 137. Black students were concentrated in HBIs, but to a lesser extent (i.e., undergraduate level -- 70.3%, graduate level -- 63.7%). A. 137.[5]

The proportion by program level of black enrollment in each

[5] As shown infra, the admission standards adopted by the defendants beginning in 1961 have provided black persons greater access to the HBIs than the HWIs. These schools, three of eight, have performed well the role thrust upon them. They not only enrolled more than two-thirds of the black students in the system, but they also awarded 67.8% (undergraduate) and 62.0% (graduate) of the degrees received by black persons in 1984-85. A.179-202.

school in 1985-86 (Ayers II, A. 45-46, 137) was

		Undergraduate	Graduate	Professional
HBIs				
	ASU	95.6	96.0	--
	JSU	91.9	59.0[6]	--
	MVSU	99.3	96.7	--
HWIs				
	DSU	17.6	26.2	--
	MSU	11.0	8.0	1.8 (veterinary medicine)
	MUW	18.0	13.0	--
	UM	5.9	7.5	5.0 (law)
	USM	14.2	8.1	--
	UMMC*	--	--	9.0 (medicine and dentistry; all programs)

* University of Mississippi Medical Center

3. Composition of Administrative Staffs

The placement of 501 of 513 administrators (97.7%) mirrored historical racial designations. A. 133. At HWIs, only 6 of 393 administrators (1.5%) were black. Ayers II, A. 49, n.22. With the pool of administrators 23.4% black overall, the percentage for each institution was (id.):

HBIs		HWIs	
MVSU	92.5%	DSU	0.0%
JSU	94.1%	MUW	0.0%
ASU	96.7%	MSU	0.7%
		USM	2.0%
		UM	2.9%

In 1986, at the highest administrative levels, HWIs reported 22 officers, who were all white, despite turnover of 15 positions since 1981. Id. HBIs had 9 black and 1 white officers. Id. The proof at trial revealed that only two black persons had

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[6] This total is explained by the fact that "[i]n 1985-86, [JSU] enrolled 59% black, 13.3% white, and 27.7% other-race pupils." Ayers II, A. 46, n.10.

reached the highest administrative levels in the five HWIs (i.e., a dean of a school at MSU, and a person third-in-charge in one of four bureaus below the president of UM). A. 173-74; 118-22 (offer of proof).[7]

4. Faculty Composition

The HWIs were also token employers of black faculty. In 1985-86, the five HWIs employed 2,563 faculty, of whom only 60 (2.3%) were black. Ayers II, A. 47, n.16. In that year, each HBI had, alone, more black faculty than all five HWIs combined; i.e., ASU (108), JSU (214; 3.6 times as many) and MVSU (83). A. 130-32. In 1985-86, the schools had the following percentages of black faculty (Ayers II, A. 47-48):

HBIs		HWIs	
JSU	67.3%	UM	.5%
ASU	67.9%	MUW	1.9%
MVSU	73.5%	MSU	2.3%
		USM	2.4%
		DSU	5.0%

5. There are Disparities in Programs and Funding Traceable to the Discriminatory System

A university's program determines the nature of the education which it offers to its students, and influences its

[7] The lower courts sidestepped the issue of employment of administrators by neglecting to set forth the statistical pattern, ignoring the tetimony of witnesses, and asserting that problems had been remedied. See Ayers I, A. 3, 41-42; Ayers III, A. 84.

attractiveness to potential applicants.[8] As noted, the defendant Board admitted (in 1954) and the district court found (as of 1962) that the defendants, historically, provided narrower, less well-funded educational opportunities to black citizens at the HBIs. This pattern continued through the trial.

a. Programs in General

The panel majority set forth the grossly distorted pattern of program offerings at the institutions in 1974 (see Ayers II, A. 49), characterizing it as follows:

> The statistics indicate that the three white comprehensive universities offered more programs than the historically black universities. The historically black universities offered only 6.2% or 24 of the 388 graduate programs. The white comprehensive universities offered all 110 doctoral programs. Alcorn State University and Mississippi Valley State University were limited to undergraduate instruction. Id., A. 50.

The en banc majority, rejecting a district court finding, concluded that disparities in programs persisted to the time of trial (Ayers III, A. 85):

> The district court incorrectly concluded that the disparities among the institutions were not reminiscent

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[8] Put another way, in Mississippi, a university's current program determines whether its students receive an education free of the taint of prior racial discrimination and whether the school has a real possibility of attracting a desegregated student body. For these reasons, private plaintiffs and the United States addressed the programs and resources of the institutions. Accordingly, the en banc court's suggestion that plaintiffs advance a "separate but equal" notion is grossly unfair. See Ayers III, A. 81, 85. Compare Sweatt v. Painter, 339 U.S. 629, 632-34 (1950) (Court compared resources of University of Texas Law School and new "law school for Negroes", since this bore upon rights of Sweatt); see also United States v. State of Alabama, 828 F.2d 1532, 1551 (5th Cir. 1987), cert. denied, 108 S.Ct. 2857 (1988).

> of the former de jure segregated system. Ayers I, 674 F. Supp. at 1560. On the contrary, the disparities are very much reminiscent of the prior system....[9]

b. Land Grant Programs

ASU and MSU are Mississippi's "land grant institutions." Ayers I, A 21.[10] The district court accepted plaintiffs' contention that MSU's programs were "vastly superior" to those at ASU with regard "for example" to "breadth of course offerings and research opportunities...." Ayers I, A. 40.

c. Funding

In 1985-86, the make-up, in total, of the HWIs was 85.6% white and 11.4% black, and that of the HBIs 3.2% white and 90.1% black. A. 137. The panel majority set forth data on expenditures for the years 1960, 1980, and 1986, revealing, for example, in 1986, a $2,763 per student disadvantage for HBIs (and their students, almost entirely black). Ayers II, A. 52.

These expenditure differences were explained by the "comprehensive" status of the largest HWIs (Ayers I, A. 40), or their more expansive missions. Ayers III, A. 82. However, the

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[9] The panel majority agreed with this factual assessment, writing (Ayers II, A. 50): "As of 1986, although change had occurred, [the 1973-74] pattern of program offerings remained discernable." The panel majority also demonstrated that from 1975 to 1986, the defendant Board did not adhere to a pledge "to give the historically black institutions priority for new programs." Id. at n.24.

[10] Such institutions "[provide] instruction in agriculture and mechanical arts, research in agriculture through...experimental stations, and extension of knowledge to farmers through cooperative extension programs." Id.

lower court's opinions show that these explanations were problematic. Discrimination produced more comprehensive status (Ayers I, A. 6, 29); the pattern persists (Ayers III, A. 85); and the mission designations followed the shaping of schools. Ayers III, A. 83.[11]

The en banc majority cited one aspect of the testimony of the U.S. expert on funding, Dr. Larry Leslie. Ayers III, A. 82. Dr. Leslie also testified that a historical pattern of funding has a continuing impact on institutional quality.

> The quality of the faculty, the facilities, the curriculum, the students today is the product of past as well as present formulas in previous financing budgets. A. 164.

Overall, Dr. Leslie concluded that "between white and black students in the State, between traditionally white and black institutions" "there is an accumulated deficit due to long term financial disparities...." A. 169. The defendant board's administrator responsible for funding matters agreed that the current funding formula had not included any factor based on the premise that earlier funding was not equitable to HBIs. A. 171-72. Thus, the panel majority wrote (Ayers II, A. 53): "The funding formula employed by the Board does not, however, account for the historical disparity."

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[11] The panel majority stated that current practices "perpetuated the [earlier] discriminatory funding practices...." Ayers II, A. 53. Only the panel majority addressed the question of the salaries of black faculty, an area where the defendant Board admitted discrimination as of 1954. A. 102. It found current racial disparities in faculty salaries to be "vast." Ayers II, A. 48.

D. The Institutional Mission Designations of 1981 Had the Effect of Maintaining the More Limited Program Scope at the Historically Black Institutions (Adversely Affecting their Students and the Ability to Attract Others)

In 1981, after their shaping by racial discrimination, the Board adopted mission designations for the eight universities. Ayers III, A. 74. These designations, inter alia, labelled as "comprehensive" -- "impl[ying] a greater number and higher level of degree offerings" -- three HWIs (MSU, UM, USM). Id. Two of the three HBIs were classified as "regional," "signif[ying] course offerings generally limited to undergraduate instruction." Id.

The en banc majority wrote (Ayers III, A. 83):

> The record...supports the plaintiffs' argument that the mission designations had the effect of maintaining the more limited program scope at the historically black universities. As noted above, however, this fact alone does not deny the plaintiffs their right to equal protection. The record amply supports the findings of the district court that the designations are commonly used, educationally sound, and not motivated by discriminatory intent. Those findings are not clearly erroneous....[12]

[12] The panel majority wrote (Ayers II, A. 64, footnote omitted): "The mission designations placed an ostensibly neutral label on each institution. In reality, however, these labels, comprehensive, urban, and regional, served to officially condone the Board's discriminatory funding practices. The white comprehensive universities received the most funding and offered the most courses before the Board implemented the designations in 1981. The designations, based on the resources existing in 1981, were thus objective labels for past discriminatory practices. Perceptions of inferiority were perpetuated under the fiction of educational reasonableness. The hierarchy of the mission designations, with the three historically white institutions labeled comprehensive, reinforced the image of the white schools as the superior institutions of the state."

E. The Defendants' Adopted Admission Standards which Are Racially Discriminatory and Have Impeded the Liquidation of the Discriminatory System

1. The Defendants Adopted and Maintained an Intentionally Discriminatory Testing Requirement for Admission to the Universities

The American College Testing Program (frequently referred to as "ACT") describes the organization and its test used in college Admissions (frequently referred to as "the ACT") as follows (A. 159, emphasis added):

> The American College Testing Program is an independent and nonprofit national educational organization. A primary function of the organization is the transmission of information to students, high schools, and colleges during the students' transition from high school to college. This is accomplished largely through the ACT Assessment program and its central instrument, the ACT Assessment, which includes a Student Profile Section plus a battery of four tests of educational development: English usage, Mathematics usage, Social Studies Reading, and Natural Sciences Reading....

A student receives a score in each of the four areas and a "composite" score, which is an average of the four area scores. Each score may range from 1 to 36. A. 108-09, 159.

In February 1961, "[s]everal days" after James Meredith applied to UM, the defendant Board adopted a

> new policy [which] required that all students applying for admission to the freshman class of any of the state institutions of higher learning as of September 1, 1961, must take a test or tests prepared by the American College Testing Program (ACT). Ayers I, A. 8-9.

In August of 1961, the Board authorized each institution "to set a minimum score which applicants to such institutions must each make on the American College Test...in order to be eligible for

consideration for admission...." Id., A. 9. The district court found that

> the Board of Trustees' adoption of the ACT assessment in 1962 [sic, should be 1961]

was intentionally discriminatory. Id., A. 33; see also Ayers III, A. 83 (agreeing).[13]

More than 13 years passed. Then, in May 1976, the Board adopted a policy to be effective in the Fall of 1987. A. 10.

> "[It] stipulated that no student was to be admitted to any institution as a first-time freshman who failed to achieve an ACT score of 9" [and] "that those institutions presently requiring higher minimum ACT scores were to continue those requirements." Ayers I, A. 10.

In brief, the 1976 action provided for a particular use of "the ACT assessment" (id., A. 33), a testing requirement adopted for discriminatory reasons.

The district court treated the 1976 Board action as separate from the 1961 "adoption of the ACT assessment." It wrote (id., A. 33): "It was not until May of 1976, effective the Fall of 1977, that the Board of Trustees established minimum ACT scores for college admission." The court found this action to be nondiscriminatory. Id.[14]

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[13] "In 1963, Mississippi State University, the University of Mississippi, and the University of Southern Mississippi enacted policies requiring all freshman applicants to achieve a minimum composite ACT score of 15. (U.S. Exhibit 913.) Mississippi State University and the University of Southern Mississippi did not admit their first black pupils until 1965 and 1967 respectively." Ayers I, A. 9. "At the time, the average ACT score for white Mississippi students was 18 while the average for black Mississippi students was 7." Ayers II, A. 46.

[14] As noted below (pp. 44-45, n.58), the Board was responsible for the scores established in 1963 by the HWIs.

The en banc majority rejected the argument that the district court's treatment of the issue was inconsistent with Hunter v. Underwood, 471 U.S. 222, 231-32 (1985). See Ayers III, A. 83.

2. The Defendants' Test Score Requirements for Admission Have Impeded the Liquidation of the Discriminatory System

a. The Minimum Score Requirements on the American College Test (ACT) Have Uniformly Been Higher at the Historically White Schools

As previously noted, in 1963 the three largest HWIs required "freshman applicants to achieve a minimum composite ACT score of 15." "As of the mid-1970's," DSU also required a minimum composite score of 15 for regular admission as a freshman. Ayers I, A. 9. The three HBIs "did not require a minimum score for admission". Id.

In 1976, as noted, the Board established, directly, an ACT composite score of 9 as a floor for all institutions. Id., A. 10. The HBIs then established, with Board approval, minimum requirements. Id. Thereafter, there has been a uniform pattern of all HBIs having lower minimum requirements than all HWIs. As of trial, the minimum score requirement for regular admission as a freshman to each HBI was 13. Id., A. 12. At this time, the minimum requirement for regular admission as a freshman was 15 for four HWIs (DSU, MSU, UM and USM) and 18 for MUW (as of fall 1987). Id., A. 11-12.[15]

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[15] For most of the period between 1977 and 1987, the gaps between the minimum score requirements of the HBIs and HWIs were larger. Ayers I, A. 10, 12.

b. Exceptions to the Minimum Score Requirements Have Been More Generous at the Historically Black Schools

Beginning in December 1977, the defendant board authorized each school to admit "under a 'special talents' or 'high risk' category" "some students" scoring below the institution's minimum score, but at least "nine." Ayers I, A. 10. These exceptions have also been, uniformly, more expansive at HBIs than HWIs. Id., A. 11-12.[16]

c. The Pattern by Race of ACT Scores: Black Students Score Substantially Lower than White Students

In 1985-86, roughly 7 of 10 white high school graduates and 3 of 10 black graduates scored 15 or higher on the ACT, the cutoff score for regular freshman admission at four HWIs. A. 138-39. An estimate of the potential impact of the MUW Fall 1987 minimum score requirement of 18 may be developed by reference to the 1985-86 data. In that year, 52.5% of white high school graduates and 15.3% of black graduates attained a score of 18 or higher. A. 138-39.

As noted, there some exceptions to test score requirements.

[16] As of trial, DSU, MSU, UM and USM could "enroll on an exceptional basis a number [of students with ACT composite scores of 9-14] not to exceed 5% of the previous academic year's freshman class enrollment or 50 students (whichever is greater)...." Id., A. 11-12; explanation and emphasis added. ASU and MVSU, smaller institutions, could make exceptions, for students with composite scores of 9-12, up "to a number equivalent to 10% of the previous year's fall term enrollment." Id., A. 12; emphasis added. JSU could use a base of 8% of freshman class enrollment to make exceptions to its minimum score of 13. Id., A. 12. JSU could also admit students with scores of 9-12 and high school grade point averages of B or better, or a class rank of 50% or higher, without counting them against the 8% exceptional allowance. Id.

In 1985-86, 2470 black and 2764 white high school graduates had ACT scores of from 9 to 14. However, in 1984-85, the last year for which data was available at the trial, the total number of positions at the five HWIs for high risk and talented students was only 457. A. 106. Furthermore, MUW admitted no high risk/talented students in the years 1982-83 to 1986-87. A. 161.

d. Factors Promoting Application by Black Persons to Historically Black Schools

The evidence revealed factors which would promote applications by black persons to HBIs rather than HWIs.

First. The HWIs recognized the importance to potential black applicants of the presence of black faculty and staff,[17] but were token employers of black persons compared to HBIs.

Second. As the panel majority noted (Ayers II, A. 46-47, n.12): "[t]he record suggests that the availability of the high risk exceptions at the historically white schools was not publicized in their recruitment materials."[18]

Third. The impact of a person's knowing that his/her score is likely to be below the minimum score for regular admission is significant. "A lot of people take [the ACT] in their junior year and again in their senior year." A. 176; compare A. 146 and 147 (from 1981-82 to 1985-86, total number of black youth taking

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[17] See A. 175 (president of USM). Minority recruitment brochures pictured black staff and discussed their presence. E.g., A. 158.

[18] Very often, notice was given of the score requirement of 15, but not the exception. E.g., DSU A. 134-36 (catalogue); A. 156 (brochure); A. 152-54 (recruitment meetings).

ACT was from 2000 to 3000 greater than black graduates taking ACT). Thus, when black twelfth graders have applied to take the ACT, and faced a question about a preferred university (A. 177), many have known that their ACT score would be unlikely to qualify them for regular admission to an HWI.[19]

3. More Inclusionary, Alternative Admission Criteria Are Available

There are alternatives to the board's policy of excluding persons from the regular freshman admission pool based upon a single ACT composite test score. For example, ACT publications recommend use in admission decisions of the four subject matter test scores, combined with an applicants's high school grades (A. 110), on the ground that this provides "better" prediction of first year college success than either alone. Id.; see also Ayers III, A. 83, 84 (same).[20]

Differences in black and white grading patterns are less substantial than in test scores.[21] Consequently, reliance on grades would render a more racially inclusive pool of persons

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[19] The district court and the en banc majority did not address these three factors.

[20] Indeed ACT's "policies" "for responsible uses of test scores" oppose eliminating a student from the regular admission pool based solely on a single test score. See A. 159a, 160.

[21] In 1985-86, the percentage of white high school graduates with ACT composite scores of 15 or higher exceeded the black graduate percentage by 2.4 times (A. 138-39); for high school grade point average of 3.0 to 4.0, the comparable figure was 1.4 times. A. 140-45.

eligible for regular admission to the HWIs.[22]

II. The Reasons Relied Upon for Allowance of the Writ

A. Introduction: The Separate and Unequal System is Substantially Intact

It is undisputed that Mississippi officials created a "separate and unequal" system of higher education. This case has been dismissed, although the record, when fully described, shows that the "roots [of de jure segregation] are spread all over the terrain and that [its] branches create shadows over areas where Brown was supposed to usher in rays of sunshine." Ayers II, A. 63. Moreover, without a hearing focusing on remedy, the panel majority emphasized correctly that "we have not...seen the road signs for the exit to impossibility." Ayers II, A. 67.[23]

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[22] The district court found "adequate justification" for the Board's decision not to provide for use of grades in the admission process. Ayers I, A. 33. It cited Board "[concern]" about "grade inflation and the lack of comparability in grading practices and course offerings among Mississippi's diverse high schools." Id. However, the Board was inconsistent on this point, as the district court's findings show. Id., A. 12 [Board approved use of high school grade point average in admission decisions by MUW and JSU (also class rank at JSU)]. See also A. 111-12 (MVSU had same policy as JSU as of February, 1986).

[23] A remedial hearing may not be discounted, in advance, as futile. See, for example, United States Department of Education's "Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education," 43 Fed. Register 6658-64 (February 15, 1978), A. 90-96 [steps to enhance the attractiveness of historically black institutions by improving their physical plants, equipment, program offerings, or financial suppport (A. 93); reassigning programs, course offerings, or resources (A. 93); realigning land grant programs (A. 93); compensatory instruction and financial aid (A. 94)]. See also Geier v. University of Tennessee, 597 F.2d 1056, 1062, 1062-63 (6th Cir.), cert. denied, 444 U.S. 886 (1979) (relocation of program produced "meaningful results"); Geier v. Alexander, 801 F.2d 799, 802-03 (6th Cir. 1986) (use of scholarships to desegregate programs); Ayers II, A. 63 (salary incentives for staff)].

Plaintiffs' statement of the case shows that the discriminatory system has not been dismantled and is substantially intact:

Black citizens' participation in the system continues to lag behind that of white citizens. Although the defendant Board had recognized the significance of this factor, the lower courts did not even discuss it.[24]

The Board employs only a tiny fraction of the existing force of black faculty and administrators at its HWIs. Its record of employing black administrators at HWIs is particularly atrocious. This action denies black persons a fair role in the governance of institutions from which they were long entirely excluded; identifies as "white" institutions which all persons are said to "have real freedom of choice to attend" (Ayers III, A. 71);[25] and, generally, perpetuates the "history of racial subjugation with its attendant messages of inferiority." Ayers II, A. 62.[26]

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[24] As plaintiffs show infra, Title VI regulatory standards, as construed by the United States Department of Education, require states which created separate systems of higher education to address the question of parity of participation.

[25] See United States v. Jefferson County Board of Education, 372 F.2d 836, 883-86 (5th Cir. 1966) (staff segregation is inconsistent with mandate for a nondiscriminatory educational system and encourages segregatory student choices), adopted in pertinent part, 380 F.2d 385 (1967) (en banc), cert. denied sub nom. Caddo Parish Board v. United States, 389 U.S. 840 (1967); compare Anderson v. Martin, 375 U.S. 399, 404 (1964) (Louisiana statute requiring candidates' race to be placed on nominating papers and ballot "encourage[d] its citizens to vote for a candidate solely on account of race...," in violation of equal protection clause).

[26] See Jackson v. Wygant, 476 U.S. 267, 316 (1986) (Stevens, J., dissenting) ("The inclusion of minority teachers..." "...is consistent with the principle that all [people] are created equal; the exclusionary decision is at war with that principle.")

From the time when James H. Meredith commenced his brave struggle to the present, the Board's admission standards have always been more consistent with perpetuating the historical racial configurations, than establishing a new order. The Board adopted "the ACT assessment" for racially discriminatory reasons, and then continued to use it to define the regular freshman admission pool of each university. The Board's admission standards have uniformly provided black citizens greater access to HBIs than HWIs. The Board eschewed alternative admission criteria, preferred by the American College Testing Program, which would have rendered a more racially inclusive pool of persons eligible for regular admission to the HWIs.[27]

Seventy percent (70%) of the black students enrolled in Mississippi's public higher education system in 1985-86 attended an HBI with almost no white persons. This is hardly surprising in view of the en banc majority's concession that "the disparities among the institutions" -- which have long disfavored the HBIs -- "are very much reminiscent of the prior system." Ayers III, A. 85. The choice between the HWIs and HBIs does not present a "["close"] question" for white persons. Sweatt v. Painter, 339 U.S. 629, 634 (1950).[28]

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[27] See, e.g., Hawkins v. Board of Control, 350 U.S. 413, 414 (1956) (recognizing, implicitly, the fundamental importance of establishing nondiscriminatory access to a program).

[28] In sum, as the Fifth Circuit recognized at a time when freedom of choice was deemed an acceptable method of desegregating elementary and secondary schools, this was not a case of "real freedom of choice...." Ayers III, A. 71. See Plaquemines Parish School Board v. United States, 415 F.2d 817, 831 n.24 (5th Cir. 1969) ("Free choice of schools can have no meaning

Moreover, the Board's admission standards, the failures to publicize the HWIs' exceptions to cutoff scores, and staffing policies which have racially identified schools -- have promoted attendance by black persons at HBIs. Therefore, the en banc majority's concession that disparities continue also means, necessarily, that each year, at HBIs, thousands of black students continue to receive, due to state action, not real free choice, educational opportunities which are less well funded, and tainted by prior racial discrimination.[29] Finally, the en banc majority agreed with "the plaintiffs' argument that the mission designations [of 1981] had the effect of maintaining the more limited program scope at the historically black universities." Ayers III, A. 83. Thus, the Board locked in segregation and the denial of equal opportunity.[30]

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where the choice is between schools which maintain athletic facilities and attractive grounds and schools which have no athletic facilities and grounds that are in a state of disrepair.").

[29] See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18-19 (1971) (requirement of remedying "invidious racial distinctions" in matters such as "the quality of school buildings and equipment"); Bazemore v. Friday, 478 U.S. 385, 407 (1986) ("...no evidence of any discrimination...in... services...").

[30] See Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979) (improper perpetuation of systemic racial discrimination).

B. Issue One: The Standards Governing the Defendants' Obligation under the Constitution

1. The Court of Appeals' Holding Concerning the Appropriate Remedial Standard Is In Conflict with Holdings of the Court of Appeals for the Sixth Circuit

The text of the opinion of the en banc majority shows that its holding concerning the remedial obligation applicable in this case is in conflict with holdings of the Court of Appeals for the Sixth Circuit in Tennessee litigation. See Ayers III, A. 78-80.

Thus, in discussing the Geier litigation in that circuit,[31] the en banc court notes that: (i) the case involved "desegregation of the public universities [of Tennessee]..."; id., A. 78; (ii) "[t]he Sixth Circuit held that the district court was entitled to impose affirmative remedies to remove the vestiges of prior discrimination and that the provision at issue [creating a program to increase black enrollment in "professional" programs] contained a permissible remedy"; id., explanation added; (iii) "[w]e disagree with both the holding and reasoning in Geier"; id. A. 79; and (iv) "[w]e... hold that to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the State of Mississippi satisfies its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race neutral policies and procedures." Id., A. 80.[32]

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[31] Geier v. Alexander, supra, 801 F.2d at 802, 804-05.

[32] An earlier decision of the Court of Appeals for the Sixth Circuit in the Geier litigation further demonstrates that the court requires affirmative, result-oriented remedies, not simply a cessation of overt discrimination and

This conflict in the circuits warrants the granting of review, pursuant to Supreme Court Rule 10.1.(a).

2. The Court of Appeals' Decision on the Proper Remedial Standard Involves an Important Question of Federal Law which Has Not Been But Should Be Settled by This Court

The question of the remedial standard applicable in this case under the Fourteenth Amendment may be seen as "an important question of federal law which has not been, but should be, settled by this court...." S.Ct. Rule 10.1.(c). This case is important in its own right. In 1985-86, the eight Mississippi institutions enrolled 51,807 persons, including 14,600 black citizens. A. 137. Thousands of additional black and white persons will enter the system each year. Moreover, the importance of the question does not depend solely on this case. The same issue is pivotal in two other pending cases regarding the higher education systems of Alabama[33] and Louisiana.[34] In

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neutrality. Indeed, the court specifically rejected the standard here approved. See Geier v. University of Tennessee, 597 F.2d 1056, 1065-68 (6th Cir.), cert. denied, 444 U.S. 886 (1979).

[33] See United States v. State of Alabama, supra, 828 F.2d at 1534-36 (explaining case as involving claims of "fail[ure] to take affirmative steps to remove the vestiges of the dual system of higher education"; reversing and remanding judgment favorable to plaintiffs, in part, on the ground that trial judge should have disqualified himself). The retrial of this case commenced in October, 1990.

[34] See, e.g., United States v. Louisiana, 692 F. Supp. 642, 644 (E.D. La. 1988) (holding generally "that Louisiana is continuing to operate an unlawful, dual system of public higher education in violation of Title VI"), appeals dismissed for want of jurisdiction, 110 S.Ct. 708 (1990); See also Order, Oct. 30, 1990 (dismissing action, although "respectfully disagreeing," because en banc decision in Ayers "is both binding and controlling") (A. 97-98).

remanding the Alabama case, the panel characterized it as one "which will affect million of Alabamians...." United States v. State of Alabama, supra, 828 F.2d at 1546.

This issue "has not been...settled by this court..." [Rule 10.1.(c) (emphasis added)], as the opinions below demonstrate.[35] Furthermore, neither Bazemore[36], nor ASTA[37], upon which the en banc majority relied, is appropriately viewed as "settl[ing]" the important question at issue in this case, whether one examines the pattern of decisions following each, or their texts. Judges faced with defining the remedial obligation applicable to state-created separate and unequal systems of higher education have widely diverged about the relevance of Bazemore and ASTA. In this case, nine judges had one view, and five another; compare Geier v. Alexander, supra, 801 F.2d at 804-05 (unanimously distinguishing Bazemore).

Turning to the texts of the decisions, the relevant two-page

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[35] The panel majority began its legal discussion by writing that "[t]he scope of a state's duty to eliminate the effects of former de jure segregation in its public universities remains in question." Ayers II, A. 54. It continued by identifying two approaches to the issue. Id. The en banc majority was similarly frank, writing (Ayers III, A. 75): "The precise constitutional obligation of a state with respect to its system of higher education, however, is not so clearly defined as in cases involving primary and secondary education." In addition, in the Geier case, supra, in a section of its opinion concerning "the duty of a state to remove the vestiges of state-imposed segregation" (597 F.2d at 1065), the Court of Appeals for the Sixth Circuit wrote: "The Supreme Court has never dealt with the precise issues in this case." See 597 F.2d at 1066. (This decision preceded Bazemore.)

[36] Bazemore v. Friday, 478 U.S. 385, 407-09 (1986).

[37] Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969) (ASTA).

majority opinion in Bazemore does not refer to higher education; it does not purport to adopt a rule applicable to all instances in which persons choose to participate in a particular entity. Bazemore characterizes the institutions involved as "clubs" (passim), "voluntary clubs" (478 U.S. at 407), and "voluntary associations supported by the Extension Service" (id. at 408). These are descriptors totally out of place with regard to Mississippi's higher education system created and maintained by state expenditures of more than a billion dollars and, subject to the "plenary" authority of the defendant Board (Ayers I, A. 3), including with regard to admission standards, staff hiring, and program placement.[38] Furthermore, the relevant part of Bazemore does not address the continuing personnel issues, which emerge so vividly when the facts are presented, rather than ignored. Plainly, the matter at issue should not be deemed "settled" by Bazemore's "terse opinion" (Bazemore, supra, 478 U.S. at 409, Brennan, J., dissenting), about such different subject matter.

The majority opinion of this court in ASTA reads as follows: "Per Curiam. The motions to affirm are granted and the judgment is affirmed." See 393 U.S. at 400. The "precedential effect of [this] summary affirmance extends no further than the 'precise issues presented and necessarily decided....'" Anderson v. Celebrezze, 460 U.S. 780, 784 n.5 (1983).

Unlike Ayers, ASTA did not involve a complaint seeking

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[38] See A. 125 (#12), 128 (#43), 129 (#46) (admission standards); A. 125 (#13) (staff hiring); A. 124 (#s 10-11), A. 126 (#16) (program placement) (Board admissions).

liquidation of the vestiges of discrimination in an entire state system of higher education. Rather, plaintiffs sought only to enjoin Alabama officials "from constructing and operating a four-year, degree-granting extension of Auburn University in the City of Montgomery, Alabama." ASTA, supra, 289 F. Supp. at 785. Moreover, the district court's findings could be seen as supporting denial of this relief whatever remedial duty applied. The court accepted the premise that additional higher education capacity was needed in the area. Id. at 788-89. It found that it was "certainly as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State (the existing HBI in the area] would so evolve." Id. at 789; explanation added. It found that constructing the Auburn branch would better fulfill the need for expansion, than adding to Alabama State. Id. In this setting, this Court did not "necessarily [decide]," sub silentio, that a state's obligation regarding its entire system is limited in the manner suggested by the ASTA district court. See also Norris v. State Council of Higher Education for Va., 327 F. Supp. 1368, 1372 (E.D. Va.), aff'd, 404 U.S. 907 (1971) (explaining ASTA).

In 1990, higher education, like education at the elementary and secondary level, is of vital importance to each person. This Court should identify the basic standard for determining whether "the clear and central purpose of the Fourteenth Amendment..." [Loving v. Virginia, 388 U.S. 1, 10 (1967)] has been fulfilled in

Mississippi's system of higher education.

3. Alternatively, the Court of Appeals' Decision Conflicts with Decisions of this Court Establishing the Standards Applicable in Instances of Systemic Racial Discrimination by State Actors

Alternatively, plaintiffs contend that review should be granted because the court of appeals' decision "conflicts with applicable decisions of this court" [Supreme Court Rule 10.1.(c)], concerning the standards of liability and remedy applicable in this case.

a. In Instances of Systemic Racial Discrimination, State Officials Are Required to Liquidate Racial Discrimination and its Effects Insofar As Possible

This Court has frequently confronted systemic racial discrimination in the conduct of government. In response, the Court developed principles of liability, and correlative remedial standards, faithful to "[t]he clear and central purpose of the Fourteenth Amendment...to eliminate all official state sources of invidious racial discrimination...." Loving v. Virginia, supra, 388 U.S. at 10. In brief, state actors are liable not only for current intentional racial discrimination, but also its lingering effects or vestiges; and courts must direct them to remedy both, to the extent possible.

These principles emerge from discussions regarding

liability,[39] liability and remedy,[40] or remedy,[41] with liability principles being implicit in the last instance. This is true because "[a]s with any equity case, the nature of the violation determines the scope of the remedy." Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 16 (emphasis added); Milliken v. Bradley, supra, 433 U.S. at 280 ["In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." (emphasis added)].

Examination of the meaning of the concept of "discriminatory effects" (or "vestiges" of discrimination) demonstrates why attention to this factor is necessary to fulfill "the clear and central purpose" of the Fourteenth Amendment. To say that an effect or vestige of discrimination continues is to say that a black citizen currently suffers (or will in the future suffer) cognizable injury, traceable to earlier overt discrimination. E.g., Louisiana v. United States, supra, 380 U.S. at 154-55 (enjoining use of "new voter-qualification test" to which black

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[39] Guinn v. United States, 238 U.S. 347 (1915) (35 S.Ct. at 931) ("grandfather clause" in voter registration context); Keyes v. School District No. 1, Denver, 413 U.S. 189, 210-11 (1973) (segregation of elementary and secondary schools).

[40] Columbus Board of Education v. Penick, 443 U.S. 449, 459 (1979).

[41] Louisiana v. United States, 380 U.S. 145, 154 (1965) (voter registration); Green v. County School Board, 391 U.S. 430, 437-38 and n.4 (1968) (desegregation of elementary and secondary schools); Carter v. Jury Commission of Greene County, 396 U.S. 320, 339-40 and n.46 (1970) (formulation of jury lists); Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 15 (desegregation of elementary and secondary schools); Milliken v. Bradley, 433 U.S. 267, 280-81 (1971) (ancillary remedies in case involving desegregation of elementary and secondary schools).

citizens would be subjected disproportionately due to earlier intentional discrimination in registration process); Carter v. Jury Commission of Greene County, supra, 396 U.S. at 339-40 and n.46 (approving relief which required formulation of new "jury list" in accord with Alabama law and constitutional principles; relief would avoid trials pursuant to discriminatory list); Milliken v. Bradley, supra, 433 U.S. at 287 (relief to address students' "conduct and attitudes reflecting their cultural isolation").

This record, when described, also reflects continuing effects or vestiges of discrimination (as noted above); e.g., exclusion from governance of HWIs, segregation, and massive denials of equal opportunity flowing from the continuing disparities at HBIs, to which several forms of state action have directed black persons. Furthermore, with the separate and unequal structure substantially intact, this is a case in which the stigma addressed in Brown v. Board of Education, 347 U.S. 483, 494-95 (1954) persists.

Related standards and procedures emerged in this Court's decisions addressing systemic racial discrimination:

First. A Court must identify the activity, service, or elements of a system subject to discrimination and describe the current status. Louisiana v. United States, supra, 380 U.S. at 155 (statistics showing decrease in number of black citizens registered; potential discriminatory impact of allowing use of new registration standards given the pattern of registration);

Swann, supra, 402 U.S. at 15, 18-21 (nature of remedy "is to be determined by the nature and scope of the constitutional violation"; also indicating need to scrutinize and address each element of system infected by discrimination).[42]

Second. Officials must act affirmatively to cure lingering effects or vestiges of discrimination. Green v. County School Board, supra, 391 U.S. at 437-38; Carter v. Jury Commission of Greene County, supra, 396 U.S. at 339-40 and n.46 (approving order requiring formulation of new jury list); Swann, supra, 402 U.S. at 15.[43]

Third. "Racially neutral" proposals do not satisfy the "affirmative duty," where they "fail to counteract the continuing effects of past [discrimination]...." Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 28. Similarly, actions which "perpetuate" or "continue" prior discrimination, or "impede" its disestablishment, are inadequate. Dayton Board of Education v. Brinkman, supra, 443 U.S. at 538. The Fourteenth Amendment is not neutral about intentional discrimination. Thus, where its effects or vestiges persist,

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[42] See also United States v. Lawrence County School District, 799 F.2d 1031, 1039-42 (5th Cir. 1986) (court set forth statistics regarding student enrollment, faculty assignment, and make-up of each bus route).

[43] The concept of an "affirmative duty" is related to the meaning of "lingering effects" or "vestiges" of discrimination. Black citizens are, by definition, continuing to experience injury due to earlier intentional racial discrimination; conduct embodying a remedy, by officials with power to act (i.e., affirmative action), is necessary to negate the earlier intention and end the harm. See Columbus Board of Education v. Penick, supra, 443 U.S. at 459 ("Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.").

imposing continuing injury, conduct which protects the status quo is insufficient.

Fourth. Where effects or vestiges of discrimination continue, officials' conduct is measured by its impact, not its purpose. Dayton Board of Education v. Brinkman, supra, 443 U.S. at 538 (and cases there cited). By definition, the situation is one where earlier overt discrimination continues to have a negative impact. A fresh determination of purpose is, therefore, unnecessary.

The broad remedial obligations expressed in these cases have some limits. The "discriminatory effects of the past" are to be "eliminate[d]" "so far as possible." Louisiana v. United States, supra, 380 U.S. at 154; see also Milliken v. Bradley, supra, 433 U.S. at 280 ("as nearly as possible"). Courts are to engage in "adjusting and reconciling public and private needs" [Brown v. Bd. of Ed., 349 U.S. 294, 300 (1955) (emphasis added); Milliken v. Bradley, supra, 433 U.S. at 280, n.15), and "take into account the interests of state and local authorities in managing their own affairs consistent with the Constitution." Id. at 280-81.

b. Bazemore v. Friday

In 1986, in Bazemore v. Friday, this Court held that North Carolina officials had satisfied their remedial obligations regarding "4-H and Homemaker Clubs," although "there were a great many all-white and all-black clubs." Id., 478 U.S. at 407-09. The Court referred to the entities involved as "clubs" (id.,

passim), "voluntary clubs," (id. at 407), and "voluntary associations supported by the Extension Service." Id. at 408. The majority also wrote: "it [Green, supra] has no application to the voluntary associations supported by the Extension Service." Id.

The en banc majority viewed Bazemore as establishing neutrality as the governing standard in this case. However, Bazemore need not be construed to depart so sharply from the historical principles. It may be explained, by reference to the general principles, in two ways.[44]

First. If one considers the factor of possibility, the relevant part of Bazemore may be seen as consistent with the general standard. With exclusion based on race long ended (478 U.S. at 407), with admission based solely upon choice and "no statutory or regulatory authority to deny a young person the right to join any club he or she wishes to attend" (id., at 408), and with a finding of "no evidence of any discrimination...in... services..." (id., at 407), negating the likelihood either that differences in services had distorted choices, or that program changes could induce desegregative choices, the Court apparently concluded that nothing more was possible regarding racial make-up.

Second. Bazemore's emphasis on "clubs" and "voluntary associations" suggests another distinction, from this case,

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[44] Like the dissenters below (Ayers II, A. 56), plaintiffs view Bazemore as factually distinguishable. See pp. 35-38, infra.

grounded in general principle. As noted supra, this Court has characterized a court's remedial endeavors as including "adjusting and reconciling public and private needs...." E.g., Brown II, supra, 349 U.S. at 300; emphasis added. Bazemore seems to mean that any conceivable, more intrusive remedies are not appropriate where, unlike Ayers, "private" interests are so significant that "voluntary associations" and "clubs" are apt descriptors.

This Court's two statements that Green "has no application ..." (Bazemore, 478 U.S. at 408) parallel these two distinctions. Green discussed remedial standards in two senses. This Court quoted (391 U.S. at 437-38, n.4) the general historical standard as stated in Louisiana v. United States, including the element of possibility; it then applied that standard to elementary and secondary schools, where reassignment was plainly a possible remedy. Turning to the portion of Bazemore distinguishing Green, one initially finds a focus on Green's second aspect. Youth, the opinion explains, are not assigned to 4-H or Homemaker clubs; one particular remedy available in Green is unavailable. To be sure, youth are not assigned to Mississippi universities either. However, here it is certain that plaintiffs, drawing upon Green's reiteration of the general principle, will be able to show, at a focused remedy hearing, other affirmative steps, including those suggested by the U.S. Department of Education, sufficiently likely to produce progress in Mississippi, over time, that

implementation must be attempted.[45]

In addition, with regard to plaintiffs' point about "private needs," one finds this Court writing that Green "has no application to the voluntary associations supported by the Extension Service" (emphasis added), and "this wholly different milieu" (emphasis added). The word "milieu" denotes a setting like a club, rather than a structural feature like choice.[46]

c. The Opinion of the Panel Majority Employed the Correct Standards

The panel majority held the pre-Bazemore, general principles established by this Court in addressing instances of systemic racial discrimination to be applicable. They carefully identified the lingering vestiges of discrimination. Ayers II, A. 44-53, 63-64. They focused upon the impact of mission designations and funding practices (id., A. 53, 64), not their purpose. They "held that Brown and Green place an affirmative duty on the state to eliminate all of the vestiges of segregation, root and branch, in the public university forum." Id., A.67.[47] They recognized that remedies are limited by possibility. Id. ("In this case, however, remember that we have

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[45] See p. 18, n.23, supra.

[46] See the American Heritage Dictionary of the English Language (New College Edition) (1978) ("...Environment or surroundings [French, environment, midst...from Latin...place...]" [p. 832]). A. 178.

[47] In Brown v. Board of Education, supra, 349 U.S. at 299, this Court referred to a "transition to a system of public education freed of racial discrimination."

not even seen the road signs for the exit to impossibility."). They remanded for remedial proceedings. Id.[48]

The panel majority did not ignore Bazemore. It found Ayers to be factually distinguishable (id., A. 56) (to which this petition turns shortly). It also found Bazemore, if broadly construed, to be inconsistent with the classic statement of principles, requiring that relief address racial discrimination and its effects. In the absence of an explicit overruling of the precedents establishing that approach, it found them more relevant and applied them (id., A. 62),[49] in an opinion by a judge with more than 23 years of experience in a circuit in which racial discrimination cases are standard fare.

d. The Bazemore Case is Factually Distinguishable from this Case

In Bazemore, this Court held that state officials had fulfilled their remedial obligation regarding "clubs" once organized on a segregated basis. The case was one where the extension service "opened any club, then existing or newly organized, to any otherwise eligible person regardless of race." Bazemore, supra, 478 U.S. at 407. There was "no evidence of any discrimination since that time in...membership...." Id. Indeed, there was no indication of any differential admission standards,

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[48] Re remedies, see n. 23, supra.

[49] "For history will not let us arrogate the power to do overtly, what we are confident Bazemore did not do covertly, overrule Brown, Green, and a long line of equal protection cases. If these cases are to die, they at least deserve the dignity of a burial." A. 62.

or any "statutory or regulatory authority to deny a young person the right to join any club he or she wishes to join." Id. at 408. There was no indication of any structural factors likely to skew choices in a racial pattern. As the lower courts found "[n]o evidence of any discrimination...in services..." (id.), there was no indication that membership in one club or another was significant in this regard. In short, there was no illegality, where choice operated in the context of a level playing field. The record establishes that the Ayers case is distinguishable in each respect noted above. Choice has been superimposed on "a 'loaded game board.'" Swann, supra, 402 U.S. at 28; see also Ayers III, A. 87 (dissenting opinion of Higginbotham, J.) ("...constitutional obligation...to ensure that freedom of choice is real, not just theoretical"). Finally, this case is also distinguishable with regard to Title VI standards.

This record shows the following:

First. The lower courts held that the test requirement adopted in 1961 was intentionally discriminatory. The admission standards which they identified as lawful did not become "effective [until] the Fall of 1977." Ayers I, A. 10. Moreover, application of correct standards requires a holding that intentional discrimination continues to the present. See Hunter v. Underwood, supra, 471 U.S. at 231-32 and pages 44 to 46, infra. Defendants' admission standards are also inconsistent with 34 C.F.R. Sec. 100.3(b)(2), a contention which the en banc majority ignored. See pages 46 to 48, infra.

Second. There is no indication in Bazemore, as here, of personnel allocation likely to skew the pattern of choices. See page 19 and n. 25, supra; see also Swann, supra, 402 U.S. at 18 (referring to a situation "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff...").

Third. The en banc majority conceded that the system continues to be marked by disparities (disfavoring HBIs) reminiscent of the dual system. A realistic appraisal of the fact that almost no white persons choose to attend HBIs must take account of this factor. See pages 20-21 and n. 28, supra.

Fourth. Unlike Bazemore, defendants have statutory authority, which they have exercised, to control by admission standards, including different standards, access to all schools. A. 125 (#12), 128 (#43), 129 (#46) (admissions). Moreover, defendants have plenary control over program placement at all schools; see A. 124 (#s 10-11), 126 (#16) (admissions). See also Geier v. University of Tennessee, supra, 597 F.2d at 1062, 1062-63, 1069 (relocation of program produced "meaningful results").

Fifth. There is a stark difference between this case and Bazemore with regard to the provision of "services." Mississippi officials favored HWIs, discriminatorily, with regard to resource allocation. Then, when James Meredith's appearance raised the prospects of black persons' attending HWIs, and enjoying equally the superior resources, the defendants, with the connivance of their agents at the HWIs, quickly established test score

requirements which rendered most black citizens ineligible to attend HWIs.[50] To the present, defendants, in several ways, promote attendance by black persons at HBIs (see pages 16-17, supra), which the en banc majority concedes continue to suffer the ill-effects of earlier discrimination.

Finally, this case is distinguished from Bazemore by the content of the administrative guidelines for application of Title VI to higher education systems. In Bazemore (478 U.S. at 408-09), the result followed "the [government's] interpretation of its own regulations...." Here, plaintiffs seek application of administrative guidelines in accord with their plain meaning. The en banc majority "ducked" this argument. See pages 41-43, infra.

e. The Decision of the En Banc Majority Conflicts with this Court's Applicable Decisions

The en banc majority erred by setting aside the fundamental requirement that officials responsible for systemic racial discrimination in the delivery of governmental services must not only cease active discrimination, but also liquidate its effects (or vestiges) to the extent possible. Plaintiffs have argued (see pages 32 to 34, supra) that Bazemore may be seen as consistent with the historical general principles, that its text does not establish that this Court "relied on choice alone...."

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[50] The defendants didn't provide for even one of the three largest HWIs (MSU, UM, or USM) to continue to admit all high school graduates. Compare Rogers v. Paul, 382 U.S. 198, 199 (1965).

Ayers III, A. 79.[51] In the end, this Court must answer this question about Bazemore (or take a fresh look at the question with the higher education context squarely in focus, as there is no indication it was in Bazemore).

The en banc majority relied substantially on non sequitur. The fact that students choose universities certainly bears upon what it is "possible" to achieve. It does not establish that providing plaintiffs their first hearing on remedy will lead to a conclusion that nothing has the possibility, over time, of ameliorating or "eliminat[ing] the discriminatory effects of the past" in Mississippi's higher education system. (Re remedies, see n. 23, supra.)

The en banc majority's assertion that its decision was consistent with Green's discussion of choice plans (id., A. 78) will not withstand scrutiny. Thus, it quotes Green as follows: "If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end." See 391 U.S. at 440 (emphasis added; remainder of citation omitted). This language makes clear, as does the portion of the Green opinion following it (id. at 440-42), that Green conditionally approved a choice plan, producing contact between black and white students at historically white and historically

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[51] The en banc majority contends, in effect, that plaintiffs' approach involves "distinctions" which it would be inappropriate for a court to make. See Ayers III, A. 79. However, "adjusting and reconciling public and private needs" (Brown II, supra, 349 U.S. at 300) and "tak[ing] into account the interests of state and local authorities in managing their own affairs..." (Milliken v. Bradley, supra, 433 U.S. at 280-81) require that such judgments be made.

black schools. Here, the en banc majority didn't even set forth the enrollment data available at the trial, showing that choice in Mississippi has produced a pattern similar to the one which led the Green court to reject a choice plan in the case before it (i.e., in Mississippi, there are almost no white students at HBIs).

The en banc majority's opinion conflicts with decisions of this Court in the following additional ways.

o It does not set forth the current status of the elements of the system once organized on a discriminatory basis.

o It focuses, in part, on intent rather than impact. Ayers III, A. 83. Compare discussion at p. 31, supra; see also Ayers III, A. 87 (dissenting opinion of Higginbotham, J.).

o It gives no weight to its conclusion "that the mission designations had the effect of maintaining the more limited program scope at the [HBIs]" (id., A. 83), even in the face of the finding that disparities between the universities are "reminiscent of the former de jure segregated system." Id., A. 85. Compare discussion at pages 30-31, supra.

o It basically ignores this Court's holding that redressing discrimination affecting personnel is a basic element of the transition to a nondiscriminatory system of public education. Rogers v. Paul, supra, 382 U.S. at 200.

o It does not confront, fully, plaintiffs' contention, presented to the court, that Ayers is factually distinguishable

from Bazemore.[52] It asserted that Bazemore "does not address the character of the programs" (Ayers III, A. 79), in the face of this Court's noting in Bazemore (478 U.S. at 407) an absence of any evidence of discrimination in "services."

o It adopts a "hands off" approach to the elements of the system of higher education (Ayers III, A. 80), inconsistent with controlling precedent. E.g., Milliken v. Bradley, supra, 433 U.S. at 280-81. Incredibly, this approach is taken although it is conceded that the state long manipulated these elements of the system, to the detriment of black citizens, and the system continues to bear the stain of that activity.

C. Issue Two: The Defendants' Remedial Obligation under Title VI

The question of the remedial standard applicable to this case by virtue of plaintiffs' Title VI claim is encompassed in Issue One. Rule 14.1.(a). Alternatively, plaintiffs contend that the issue involves "an important question of federal law, which has not been, but should be, settled by this court." Rule 10.1.(c).

Private plaintiffs' complaint relied in part on Title VI of the Civil Rights Act of 1964. The plaintiffs argued below that Mississippi officials had not fulfilled the remedial obligations imposed by Section 100.3(b)(6)(i) [34 C.F.R] of the Title VI

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[52] The Court did not even discuss its own prior precedent, repeatedly cited by plaintiffs, holding that segregated staffing patterns and disparities in resources may be expected to skew, racially, the pattern of student choices. See p. 19, n.25, and p. 21, n.28, supra.

regulations of the United States Department of Education,[53] as interpreted by that Department's Office for Civil Rights. See 43 Fed. Register 6658 (February 15, 1978) ("Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education") (A. 90-96).[54] This Court has frequently held that such administrative standards are entitled to considerable deference in construing the applicable regulation.[55] Not only was no deference given these standards, they were essentially repealed by the en banc court.

Plaintiffs' reliance on the Title VI regulation, as explained by the Department of Education, is significant.[56] The agency, for example, interpreted its regulation to require resulted-oriented affirmative action of the type deemed appropriate by the panel below, not simply neutrality. See Revised Criteria, 43 Fed. Reg. at 6659 (§II.B.) (A. 91); 6661-63 ("Elements of A Plan") (A. 93-95). The agency expressed the need

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[53] "In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination." A. 89.

[54] The "revised criteria" quote the pertinent regulation and state: "Consistent with the requirements of Title VI these criteria set forth the elements of a desegregation plan which would eliminate the effects of prior discrimination." See 43 Fed. Reg. at 6659, A. 91.

[55] E.g., Lau v. Nichols, 414 U.S. 563, 567, 568 (1974) (HEW "clarifying guidelines" published in Federal Register used in interpreting Title VI regulations); Honig v. Doe, 108 S.Ct. 592, 605 n.8 (1988) [Department of Education "Policy Letter" used in interpreting 20 U.S.C. §1415(e)(3)].

[56] In Guardians Association v. Civil Service Commission, 463 U.S. 582, 593-95 (1983), this Court held that there is a private right of action to enforce Title VI.

for affirmative steps so "that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation." Id. at 6661 (§I, preface) (A. 93); emphasis added. The agency interpreted its regulation to require steps to address disparities between black and white citizens in the rates of college participation and completion, at all levels (undergraduate, graduate, and professional). Id. at 6662 (A. 94). As we have noted, the defendant Board had viewed Mississippi's disparate pattern of participation in higher education as one aspect of the State's discrimination against black citizens. See page 3, n.4, supra.

The en banc majority did not fairly confront plaintiffs' Title VI argument concerning the overall remedial obligation. The Court did not even mention plaintiffs' reliance on the six, single-spaced pages of guidelines, specifically addressing this issue. See Ayers III, A. 80-81, n.11. Its reference to the Title VI issue in Bazemore (id.) -- where, manifestly, these administrative standards on higher education were not relevant -- presented but a lame excuse for its silence.

It is apparent that this Court has not "settled" this question. Plaintiffs rely on their previous arguments to establish the importance of this question and the propriety of its resolution by this Court.

D. Issue Three: The Misapplication of the Principles of Hunter v. Underwood

The decision of the en banc majority, affirming the district court, that the use of the ACT in the admission process ceased to be intentionally discriminatory during the mid-1970s, "conflicts with [the] applicable [decision] of this Court" [Rule 10.1.(c)], namely, Hunter v. Underwood, 471 U.S. 222, 231-32 (1985).[57]

The district court found that the defendant-Boards' "adoption of the ACT assessment" in 1961 was intentionally discriminatory. Ayers I, A. 33. The en banc majority agreed. Ayers III, A. 83. The en banc majority found Hunter v. Underwood to be distinguishable for two reasons (id.); neither argument will withstand scrutiny.

The en banc majority, like the district court, treated the May 1976 adoption of "minimum score requirements", by the Board, qua Board, as wholly distinct from the Board's "adoption of the ACT assessment" in 1961. This distinction is not valid. A minimum ACT score is a part of the vehicle found to be intentionally discriminatory, "the ACT assessment." A court could not enjoin as intentionally discriminatory the use of "the ACT assessment," but allow use of "minimum [ACT] score requirements"; the former encompasses the latter.[58]

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[57] Hunter held that a standard for disenfranchising persons, adopted in 1901 for racially discriminatory reasons, could not be "legitimated" by subsequent events, when it continued to have a discriminatory effect.

[58] In addition, the court's related conclusion that "minimum score requirements were not adopted until long after the test requirement..." (Ayers III, A. 83) conflicts with governing legal principle. When in 1961 the defendant Board "authorized [each institution] to set a minimum score which

The en banc majority also sought to distinguish Hunter on the ground that the Board's test standard had no "continu[ing] ...[discriminatory] effect...." Ayers III, A. 83. The court's own language exposes the fallacy of its position. Its reference to a person who "transfer[s] from a junior college without satisfying an ACT score requirement" (id.) is, in context, an allusion to a person initially denied "admission to Mississippi universities" (id.) due to an ACT score requirement. The en banc majority provides no support for treating exclusion from a university for a year as a de minimis injury. Cf. Goss v. Lopez, 419 U.S. 565, 576 (1975). In addition, on this record (see pp. 16-17, supra), the panel majority was right to view as applicable the principle of Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) ("The application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."). See Ayers II, A. 63, n.98.

Providing nondiscriminatory access to an institution is a

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applicants to such institution must each make on the American College Test..." (Ayers I, A. 9), the subject of admission standards was within the Board's "plenary [authority]." Id., A. 3; see also A. 125 (#12), 128 (#43), 129 (#46) (Board admissions). In 1963, the three largest HWIs, the institutions which had been most favored by racial discrimination in resource allocation, used their "authoriz[ation]," establishing "minimum composite ACT score" requirements, which few black persons could satisfy. See Ayers II, A. 46. This occurred not "long after" adoption of the initial ACT requirement but close in time. Even if one does not consider the 1963 actions to be action by the Board itself, or joint action, it is chargeable to the Board as conduct "by those whose edicts or acts may fairly be said to represent official policy...." Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978).

fundamental first step in the journey to nondiscrimination. E.g., Hawkins v. Board of Control, supra, 350 U.S. at 414. This issue merits this Court's consideration.

E. Issue Four: The Use of the ACT in Violation of they Title VI Regulation

In Guardians Association v. Civil Service Commission, supra, this Court held that the Title VI regulation of the Department of Education establishes in 34 C.F.R. §100.3(b)(2) (A. 89) a "disparate-impact" (or "discriminatory effect") claim. Id. at 463 U.S. at 584, n.2, 608, n.1. This terminology and the opinions of two justices demonstrate that this claim is similar to a Title VII disparate impact claim.[59] See also Board of Education v. Harris, 444 U.S. 130, 151-52 (1979) (discussing similar claim under Emergency School Aid Act).[60]

The record, as summarized above at pp. 15, 17-18, establishes the elements of a Title VI impact claim. The minimum

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[59] See 463 U.S. at 598 (White, J.: referring to proof of "some 'business necessity'" as "a complete affirmative defense to claims of violation. Griggs v. Duke Power Co., supra, 401 U.S. at 431..."); 463 U.S. at 623 and n.15 [Marshall, J.: "Rather a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity. See Bryan v. Koch, 627 F.2d 612, 623 (C.A.2 1980) (Kearse, J., concurring and dissenting in part). In this case, respondents failed to provide an adequate justification."].

[60] Thereafter, the matter has been addressed in the lower courts. Three courts of appeals, including a panel of the Fifth Circuit, have held that §100.3(b)(2) creates a disparate-impact claim similar to the Title VII claim. See Georgia Conferences of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Larry P. v. Riles, 793 F.2d 969, 981-83 (9th Cir. 1984); Quarles v. Oxford Municipal Separate School District, 868 F.2d 750, 754, n.3 (5th Cir. 1989).

score requirements have rendered a highly disproportionate number of black youth ineligible for HWIs regular admission pools. The American College Testing Program prefers the use of test scores together with high school grades and other criteria.[61] There is less racial disparity in high school grading patterns than test scores. The Board explicitly authorized three universities (JSU, MUW, and MVSU) to utilize high school grade point average in making exceptions to minimum ACT score requirements.

Accordingly, private plaintiffs presented to the court of appeals, unambiguously, a Title VI impact claim.[62] The en banc majority wholly ignored this argument, electing to address only a more difficult (from plaintiffs' perspective) claim of the United States "that the defendants' admissions practices are intentionally discriminatory, because the Board does not require the use of high school grades in conjunction with ACT scores." Ayers III, A. 83-84.[63]

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[61] See, for example, Ayers III, A. 83-84. ("The plaintiffs note that the American College Testing Program recommends that ACT scores be used in conjunction with other criteria such as grades in order to gain as complete a profile as possible of the applicant.... [Mr. Meredith] also stated that the Board was advised by ACT administrators that while the use of grades with ACT would provide a better assessment, they were satisfied with the use of the ACT alone."); Ayers II, A. 47 (citing ACT literature emphasizing the desirability of using other data in connection with test scores in assessing minority applicants).

[62] E.g., [Opening] Brief for Plaintiffs-Appellants, Sept. 27, 1988, pp. 66-67; Supplemental Brief for Plaintiffs-Appellants, April 27, 1990, p. 12.

[63] In this analysis, the en banc majority wrote in part: "Second, even assuming the policy is narrow, inaccurate and educationally unsound, it does not follow that the policy is thereby intentionally discriminatory." Id., 83-84. While we do not endorse this "logic" [see Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 267 (1977) ("[s]ubstantive departures")], it is apparent that a defendant required to

Plaintiffs reiterate the fundamental importance of nondiscriminatory admission practices. The en banc majority's avoidance of the Title VI impact claim conflicts with this Court's recognition of it in Guardians Association. Therefore, review should be granted pursuant to Supreme Court Rule 10.1.(c).

F. Issue Five: The Absence of a Remedy Hearing

The extinguishing of the rights of the plaintiff class was marked by a significant degree of procedural unfairness. The district court explicitly rejected an argument that there should be a single hearing, rather than a bifurcated proceeding. See p. 1, n.2, supra. It then dismissed the case, without providing plaintiffs an opportunity to offer evidence focusing on possible remedies.

The en banc majority's approach was even less satisfactory. It first recognized, as the history of the case required, that "[n]either this Court nor the district court addresses the specific remedies which the defendants must or might undertake in the future." Ayers III, A. 76. It then, alternatively, wrote as if it had been established that no remedy was available (id., A. 79-80), and summarily (and erroneously) rejected several possible remedies. Id., A. 80. See p. 41, supra (re "hands off" approach).

There are remedies to canvass, including those identified by

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show "business necessity" or "sufficient nondiscriminatory justification", see footnote 59, supra, would have a difficult time if such a concession were made.

the U.S. Department of Education. See p. 18, n.23, supra. The failure of the lower courts to provide for remedy proceedings, despite the fact that the "separate and unequal" system is substantially intact, "conflicts with [the] applicable decisions of this Court" [Supreme Court Rule 10.1.(c)], namely Brown v. Board of Education, supra, 349 U.S. at 299-301 (remanding cases to trial courts) and Green v. County School Board, supra, 391 U.S. at 441-42.

Conclusion

This Court should agree to review each issue raised by private plaintiffs.

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